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IN THE SUPREME COURT OF IOWA
Supreme Court No. 16-0267

STATE OF IOWA,
Plaintiff–Appellee,

vs.

MICHAEL SCHEFFERT,
Defendant–Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR BLACK HAWK COUNTY
THE HON. JOSEPH MOOTHART, JUDGE

APPLICATION FOR FURTHER REVIEW

(Iowa Court of Appeals Decision: May 3, 2017)

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QUESTION PRESENTED FOR REVIEW

As a matter of first impression, must the State plead and prove the full text of a county conservation ordinance to establish reasonable suspicion that a suspect is in a park after hours?

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STATEMENT SUPPORTING FURTHER REVIEW

The Court of Appeals decided a question of first impression in its resolution of a routine traffic-stop question. *See State v. Scheffert*, No. 16-0267, 2017 WL 1735627 (Iowa Ct. App. May 3, 2017). Although the issue was not briefed by the parties, the Court of Appeals—relying on outdated civil cases—seems to have concluded that the State cannot establish reasonable suspicion for a traffic stop based on an ordinance violation, unless the full text of the ordinance is pled, proven, and offered into evidence. *See id.* at *2–3. This conclusion is not supported by the law and the opinion rests on factual and legal errors. This Court should grant further review.

First, the Court of Appeals decided an issue of first impression that should have been decided by the Supreme Court. Iowa R. App. P. 6.1103(1)(b)(2). Two decades ago, the Court of Appeals recognized in a published decision that it was an open question whether an ordinance needed to be be pled and proven in a criminal prosecution. *Cohen v. Iowa Dist. Court for Des Moines Cty.*, 508 N.W.2d 78, 80–83 (Iowa Ct. App. 1993). Even though the parties did not litigate this

question in the present appeal,[1] the Court of Appeals cited two outdated civil-ordinance cases and concluded (1) that "judicial notice may not be taken of an ordinance" and (2) the ordinance must be "pled and proved" or otherwise "made a part of the record" to support reasonable suspicion. *See Scheffert*, 2017 WL 1735627, at *2 (internal quotation marks and citations removed). Neither claim is true. First, the Legislature has now expressly authorized judicial notice of city ordinances. *See* Iowa Code § 622.62 (2015); 1981 Iowa Op. Att'y Gen. 136 (1981) (discussing the Code revision). Second, no Iowa court has held that an ordinance must be pled and proven to establish reasonable suspicion for a traffic stop. In fact, other states come to the opposite conclusion, finding police testimony about an ordinance is sufficient for both reasonable suspicion (to support a stop) and proof beyond a reasonable doubt (to support a conviction). *See, e.g.*, *In re Frederick C.*, 594 N.W.2d 294, 300 (Neb. Ct. App. 1999); *State v. Buescher*, 485 N.W.2d 192, 193 (Neb. 1992); *DeDonato v.* State, 819 S.W.2d 164, 166 (Tex. Crim. App. 1991)*; Lalande v. State*, 676 S.W.2d 115, 116–18 (Tex. Crim. App. 1984); *City of Albuquerque v.*

[1] The defendant generally challenged the stop, but he did not argue an "ordinance" issue or cite "ordinance" cases. *See* Defendant's Final Br. at 9–10. He did not preserve an "ordinance" issue.

Leatherman, 399 P.2d 108, 110 (N.M. 1965). This Court should grant further review to correct the Court of Appeals' misunderstanding of the law.

Second, the Court of Appeals' assumption that the ordinance must be pled and proven caused it to err in its description of record. Twice, the opinion asserts the State failed to offer evidence regarding the county-park ordinance. *See Scheffert*, 2017 WL 1735627, at *2 ("…the State failed to present evidence of the purported county ordinance…"); *id.* at *3 ("… we have no evidence the ordinance Scheffert purportedly violated has been properly adopted by the conservation board…"). To the contrary, the substance of the ordinance came in through the deputy's testimony. He testified under oath that Falls Access is "a county conservation property" with restricted hours, such that citizens are not permitted in the area between 10:30 p.m. and 6:00 a.m. *See* supp. hrg. tr. p. 14, lines 4–23. The deputy further testified that the defendant was stopped for driving in the area around 12:30 a.m., which is during the prohibited time. *See* supp. hrg. tr. p. 14, line 24 — p. 15, line 7. Sworn testimony is, by definition, evidence. *See* EVIDENCE, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "evidence" as "including testimony,

documents, and tangible objects … that tends to prove or disprove the existence of an alleged fact"). The Court of Appeals opinion cannot be squared with the record.

Third, the question decided by the Court of Appeals occurs with some frequency and the uncertainty caused by the opinion is problematic. *See* Iowa R. App. P. 6.1103(1)(b)(4). *Terry* stops predicated on an ordinance violation are not uncommon. County attorneys litigating suppression motions need to know what they must do to establish reasonable suspicion for an ordinance violation. In a similar vein, city attorneys need to know what steps are needed to secure a conviction for a criminal ordinance violation. Lower courts and litigants would benefit from this Court resolving the question.

This Court should grant the application. If the ordinance issue is to be resolved, it should be by this Court, definitively, and in the State's favor.

STATEMENT OF THE CASE

Nature of the Case

The State seeks further review of a decision of the Court of Appeals. Iowa R. App. P. 6.1103.

Course of Proceedings

The Court of Appeals opinion adequately sets forth the procedural history of the case. *See State v. Scheffert*, No. 16-0267, 2017 WL 1735627, at *1–2 (Iowa Ct. App. May 3, 2017). In short, the defendant moved to suppress evidence gathered following a traffic stop, the motion was denied, and the defendant was convicted following a trial on the minutes. *See id.* at *1–2. The Court of Appeals reversed and remanded, finding the suppression motion should have been granted. *See id.* at *3.

Facts

At 12:37 a.m., a deputy sheriff stopped the defendant's vehicle at Falls Access on Beaver Valley Road in rural Black Hawk County. Hrg. tr. p. 11, lines 5–17. Falls Access is a "county conservation property" where the public can hunt and fish. Hrg. tr. p. 14, lines 4–9. Beaver Valley Road is maintained by the County Conservation Board. *See* hrg. tr. p. 12, lines 15–22.

The public is only permitted to use county parks or conservation areas during certain hours. Hrg. tr. p. 14, lines 4–15. In Black Hawk County, the public is allowed from 6:00 a.m. until 10:30

p.m. Hrg. trp. 14, lines 16–23.[2] At the time of the traffic stop, the area was closed to the public. Hrg. tr. p. 14, line 24 — p. 15, line 3.

Deputies stopped the defendant because his vehicle was in the park after hours. Hrg. tr. p. 17, lines 4–7. Once stopped, the defendant or his passenger told deputies they were in the park area "to go frogging." Suppression Ruling, p. 1; App. 7. Following a consent search, police found suspected marijuana. *See* bench trial tr. p. 5, line 18 — p. 6, line 5. The defendant admitted both that the substance was his and that he knew it was marijuana. *See* bench trial tr. p. 5, line 18 — p. 6, line 5.

ARGUMENT

I. This Court Should Grant Further Review Because the Court of Appeals Incorrectly Decided an Issue of First Impression and Misunderstood the Record.

Preservation of Error

In its appellee's brief, the State challenged error preservation and asserted waiver for the issue raised by the defendant. *See* State's Final Br. at 4–6. The State also challenges the ordinance issue

[2] It was disputed at the suppression hearing whether there was adequate signage. Hrg. tr. p. 17, line 24 — p. 18, line 10; Suppression Ruling, p. 1; App. 7. Because the law does not require signage to be posted, this fact is not material.

decided by the Court of Appeals, as that issue was not litigated in the district court or in the parties' appellate briefing. The defendant's argument below was that there should have to be signs posted to inform people they are entering a county park after hours, even though no legal authority requires that signage. *See* supp. hrg. tr. p. 21, line 12 — p. 25, line 8. The court rejected this argument in its written ruling. *See* 11/10/2015 Ruling; App. 7–8. The pleadings and rulings below do not touch on the ordinance issue. *See* 11/10/2015 Ruling; App. 7–8; 8/27/2015 Motion to Suppress; App. 6. Nor does the defendant's appellate brief cite any legal authority requiring the ordinance be pled or proven; instead he generally challenged the basis of the stop and then argued (relying on a speed-limit statute) that he should not have been stopped for driving in the park after hours unless the park had adequate signage regarding its hours. *See generally* Defendant's Final Br.

Standard of Review

Review is de novo. *State v. Kinkead*, 570 N.W.2d 97, 99 (Iowa 1997).

Merits

This Court should grant further review because the Court of Appeals decided an issue of first impression with regard to reasonable suspicion of an ordinance violation and misunderstood the record developed at the suppression hearing. Because there were articulable facts that led the deputies to believe the defendant was violating a county-park ordinance, the Court of Appeals opinion appears to rest on the novel rule that the State cannot establish reasonable suspicion of an ordinance violation without proving and pleading the full text of the ordinance. This Court should grant further review and, if it finds the ordinance issue dispositive, hold that the full text of the ordinance was not required and the stop here was supported by reasonable suspicion. The Court should also grant further review to correct the Court of Appeals' erroneous resolution of a mistake-of-law issue that is not part of the appeal.

A. Contrary to the Court of Appeals opinion, the State did offer evidence that the park was closed pursuant to an ordinance.

The Court of Appeals' conclusion rests in part on its repetition that the State did not put on any evidence regarding the park ordinance. *State v. Scheffert*, No. 16-0267, 2017 WL 1735627, at *2

(Iowa Ct. App. May 3, 2017) ("…the State failed to present evidence of the purported county ordinance…"); *id.* at *3 ("… we have no evidence the ordinance Scheffert purportedly violated has been properly adopted by the conservation board…"). This is not accurate.

There was evidence of the ordinance's content, if not its text. From the deputy's direct testimony at the suppression hearing:

> **Q.** You've referred to this area as Falls Access or as an access area. Can you just describe what an access area is?
>
> **A.** It's a county conservation property. Generally there's public hunting and fishing and things like that in those areas.
>
> **Q.** Does that type of area have hours where it's permissible for people to be there?
>
> **A.** Yes, they do.
>
> **Q.** Does it also have hours where people are not allowed to be there?
>
> **A.** Yes, it does.
>
> **Q.** What are the hours in which the general public is not allowed to be in that area?
>
> **A.** It's 6 a.m. to 10:30 p.m. is when they are allowed to be there, I'm sorry. After 10:30 p.m. they're not allowed.
>
> **Q.** After 10:30 p.m. and before 6 a.m. they're not allowed there?
>
> **A.** Correct.

> **Q.** What time, do you recall, was this traffic stop?
>
> **A.** It was around 12:30 in the morning.
>
> **Q.** And so at that point in time the access area would be closed to the general public?
>
> **A.** Correct.

Supp. hrg. tr. p. 14, line 4 — p. 15, line 3. The deputy also testified on cross:

> **Q.** And do you know why Deputy Petersen made the traffic stop?
>
> **A.** Due to the vehicle being down in the park after hours.
>
> **Q.** Do you know whether there is any citation that could be issued for being in a park after hours?
>
> **A.** I believe there's an after-hours citation.
>
> **Q.** Do you know whether that's punishable by fine?
>
> **A.** Yes, it is.

Supp. hrg. tr. p. 17, lines 4–12. And the district court found:

> The hours that the area was open to the public were 6:00 a.m. to 10:30 p.m. The general public was not allowed after 10:30 p.m. [...] The reason for the stop was the fact that the vehicle driven by the defendant was in the access area after hours.

Suppression Ruling, p. 1; App. 7. Testimony is evidence. *See* EVIDENCE, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "evidence" as "including testimony, documents, and tangible objects … that tends to prove or disprove the existence of an alleged fact"). This evidence amounted to at least reasonable suspicion that the defendant was violating a county-park ordinance. *See State v. Kinkead*, 570 N.W.2d 97, 100 (Iowa 1997) (on the reasonable-suspicion standard); *Terry v. Ohio*, 392 U.S. 1, 21–22 (1968) (same). The Court of Appeals' contention that "the State failed to present evidence of the purported county ordinance…" is mistaken and this Court should grant further review.

B. The Court of Appeals decided an issue of first impression that was never litigated by the parties. If the question is to be resolved in this appeal, it should be decided by the Supreme Court. The law favors the State.

Because the factual record establishes that the defendant was violating the county-park ordinance, the Court of Appeals' conclusion can only stand if, as a matter of law, a deputy's testimony as to the contents of the county-park ordinance was not sufficient for reasonable suspicion or probable cause. The Court of Appeals concluded the text of the ordinance had to be pled, proven, and

offered as an exhibit. *State v. Scheffert*, No. 16-0267, 2017 WL 1735627, at *2–3 (Iowa Ct. App. May 3, 2017). No Iowa case requires this, nor did the Court of Appeals recognize that its holding rested on this novel (and un-briefed) legal principle. Powerful arguments weigh against such a conclusion (for example, it does not make sense to require the State to "plead" an ordinance when it does not criminally charge a violation of the ordinance), and these arguments would have been briefed had the issue actually been presented by the defendant. Further review should be granted to remove this question from consideration or resolve it definitively in the State's favor.

The Court of Appeals appears to have assumed, based on civil disputes regarding city ordinances, that the full text of all ordinances must always be pled and offered as an exhibit before a criminal conviction may be returned. *Scheffert*, 2017 WL 1735627, at *2 (citing *Grimes v. Bd. of Adjustment*, 243 N.W.2d 625, 627 (Iowa 1976) and *Cedar Rapids v. Cach*, 299 N.W.2d 656, 658–59 (Iowa 1980)). These cases are outdated. *Grimes*, which held that "judicial notice may not be taken of an ordinance," has been abrogated by statute. *See* 1981 Iowa Op. Att'y Gen. 136 (1981) (discussing Iowa Code section 622.62). *Cach*, decided nearly 40 years ago, involved

judicial notice under section 622.62, which concerns "city" ordinances, rather than the county-conservation-board ordinance at issue here. *See Cach*, 299 N.W.2d at 659 (citing Iowa Code section 622.62(2)). The vitality of these old cases is further undermined by the state of modern technology, as evidenced by the Court of Appeals recently using an internet link to take judicial notice of a city ordinance that was "not in the record[.]" *See Behm v. City of Cedar Rapids*, No. 16-1031, 2017 WL 706347, at *1 n.1 (Iowa Ct. App. Feb. 22, 2017). Permitting reliance on internet publication of ordinances is consistent with this Court's criticism that the old rule barring judicial notice was "too restrictive," as well as the Court's recommendation that section 622.62 "be liberally construed for the purpose of admitting ordinances not qualifying for judicial notice." *Cach*, 299 N.W.2d at 659. The trend in other jurisdictions is similarly toward relaxing the formality of judicial notice for ordinances. *See, e.g.*, *State v. Putney*, 877 N.W.2d 28, 33 (N.D. 2016) ("Where an ordinance is readily available, and its reliability is not in dispute, a court should consider taking judicial notice of the ordinance and continuing with the proceedings."); *City of Aztec v. Gurule*, 228 P.3d

477, 481 (N.M. 2010) (summarizing reasons for permitting judicial notice of ordinances on appeal, including internet publication).

Contrary to the Court of Appeals' treatment of the unbriefed ordinance question in the current unpublished case, a reported decision of that Court recognized the issue was unresolved and expressly declined to reach the question. *See Cohen v. Iowa Dist. Court for Des Moines Cty.*, 508 N.W.2d 78, 80–83 (Iowa Ct. App. 1993). If anything, *Cohen* suggests the Court of Appeals again should have declined to reach the question. There, the Court of Appeals was evaluating the propriety of a judge threatening a lawyer with contempt, and the ordinance issue was an ancillary matter: the Court noted that a "conviction [for violating the ordinance] was not appealed," but instead a collateral issue was. *Cohen*, 508 N.W.2d at 78. So too here. The defendant here was not convicted of violating sections 461A.46 and 350.5 (which rely on the ordinance), but rather those statutes were the reasonable suspicion for the State to conduct a stop of the defendant's vehicle, which led to prosecution for an unrelated crime. In short, it was possible to dispose of the appeal without reaching this novel unbriefed question, but the Court of Appeals declined to do so.

To the extent question should now be resolved, it should be decided by this Court in the State's favor. Had the State sought prosecution of the defendant for violating the county ordinance, the State could have established the ordinance's text through judicial notice.[3] The County Conservation's Board's regulations are publicly accessible online and expressly establish the "closing time" requirements of section 461A.46. *See* RULES & REGULATIONS, BLACK HAWK COUNTY, IOWA CONSERVATION BOARD, http://www.mycountyparks.com/Handler.ashx?Item_ID=7A548CAF-4788-49C8-8E9C-BB51808EE17E (page 2 of the .PDF file).[4] The Board's site similarly establishes that Falls Access is a county park, open during the hours of "6:00 a.m. to 10:30 p.m." *Falls Access*, Black Hawk County Parks, http://www.mycountyparks.com/County/Black-Hawk/Park/Falls-Access.aspx (last accessed May 9, 2017). The

[3] In addition to judicial notice, at least one old case also suggests that a policeman can authenticate an ordinance's text sufficiently to establish guilt beyond a reasonable doubt. *See City of Ottumwa v. Schaub*, 3 N.W. 529, 531 (Iowa 1879).

[4] The official Black Hawk County website directs visitors to this site for information related to the Black hawk County Conservation Board. *See* Conservation, http://www.co.black-hawk.ia.us/176/Conservation (last accessed May 9, 2017) ("Please Visit BlackHawkCountyParks.com [hyperlinked in original] for more information, including camping and cabin reservations.").

Supreme Court, even at this stage in the process, could take judicial notice of the ordinance. *See* Iowa R. Evid. 5.201(d) ("The court may take judicial notice at any stage of the proceeding."); *Lucas v. Pioneer, Inc.*, 256 N.W.2d 167, 177 (Iowa 1977) (taking judicial notice on appeal of variable farming conditions and the conditions' impact on agriculture); *State v. Freland*, No. 13-0904, 2014 WL 1494953, at *2–3 (Iowa Ct. App. April 16, 2014) (taking judicial notice for the first time on appeal of a Wisconsin sex-offender-registry statute).

But the State's position is that judicial notice of an ordinance is not required when the State only relies on the ordinance to establish reasonable suspicion. The threshold for reasonable suspicion is low, requiring only "articulable facts" that criminal activity is afoot. *Kinkead*, 570 N.W.2d at 100; *see Terry*, 392 U.S. at 21–22. No Iowa court has held that an ordinance must be made part of the record to establish reasonable suspicion and, on more than one occasion, Iowa's appellate courts have upheld suppression rulings based on ordinances and given no indication that the ordinance was part of the record. *See generally State v. Pals*, 805 N.W.2d 767 (Iowa 2011) (a "dogs-on-the-loose" ordinance); *State v. Baldon*, No. 02-2063, 2003

WL 22344977, at *2 (Iowa Ct. App. Oct. 15, 2003) (a noise ordinance).

The State's position finds support in other jurisdictions. In Texas, where there is a rule that ordinances cannot be judicially noticed, the Court of Criminal Appeals has held en banc that the testimony of police officers that the defendant violated a municipal ordinance was sufficient to establish probable cause. *See Lalande v. State*, 676 S.W.2d 115, 116–18 (Tex. Crim. App. 1984)[5]; *accord Howard v. State*, 932 S.W.2d 216, 218 (Tex. App. 1996). One Texas case even holds that the State can prove a crime beyond a reasonable doubt solely based on the officer's testimony that an ordinance exists criminalizing the conduct. *See DeDonato v. State*, 819 S.W.2d 164, 166 (Tex. Crim. App. 1991). This Court need not go nearly as far as *DeDonato* to affirm and decide this appeal in the State's favor.

[5] In a striking parallel to this case, *Lalande* also involved review of a Court of Appeals determination that "no proof" of the ordinance was offered. *Lalande*, 676 S.W.2d at 116. On further review, the Texas Court of Criminal Appeals conducted an analysis similar to what this application stresses, which is that police testimony that an ordinance prohibits the conduct is sufficient, even if not ideal. *Id.* at 116–18.

Taking a different tack, Nebraska courts assume the validity of searches and seizures premised on ordinance violations when the ordinance does not appear in the record:

> [W]e hold that when police contact with an accused is precipitated by the accused's alleged violation of a municipal ordinance which contact, in turn, leads to the accused's conviction on unrelated criminal charges, an appellate court will not take judicial notice of the ordinance not in the record, but assumes that a valid ordinance creating the offense triggering the contact with law enforcement exists and that the evidence offered by the State is sufficient to support the officer's contact with the accused.

In re Frederick C., 594 N.W.2d 294, 300 (Neb. Ct. App. 1999); *accord State v. Hawes*, No. A-01-413, 2002 WL 522870, at *3 (Neb. Ct. App. Apr. 9, 2002) (applying the rule). Nebraska courts further assume the validity of a criminal conviction under an ordinance, when the defendant does not make the text of the ordinance part of the record. *State v. Buescher*, 485 N.W.2d 192, 193 (Neb. 1992); *State v. Tomlinson*, 446 N.W.2d 740, 741 (Neb. 1989). New Mexico courts similarly "consider the judgment of the district court to be presumptively correct" in an ordinance case when the ordinance is not part of the record. *See City of Albuquerque v. Leatherman*, 399 P.2d 108, 110 (N.M. 1965). Several older abstract-summary opinions

from Illinois also appear to share this view, though they offer little analysis. *See, e.g.*, *City of Chicago v. Noonan*, 204 Ill. App. 195, 196 (Ill. App. Ct. 1917); *City of Chicago v. Smith*, 203 Ill. App. 202, 203 (Ill. App. Ct. 1917); *City of Chicago v. Tearney*, 187 Ill. App. 441, 442 (Ill. App. Ct. 1914).

In a civil negligence case applying the equivalent of a traffic ordinance, the D.C. Court of Appeals concluded that "[t]raffic regulations are a part of the law of this jurisdiction which the court may consider without their admission into evidence." *Lyons v. Barrazotto*, 667 A.2d 314, 324 (D.C. 1995). In a similar vein, the appellate court in a civil California case took judicial notice of an ordinance "referenced by neither party" to the action. *See City of Monterey v. Carrnshimba*, 215 Cal. App. 4th 1068, 1077 n.5, 156 Cal. Rptr. 3d 1, 7 n.5 (Cal. App. 2013). These cases suggest that ordinance violations can be established without the admission of the ordinance's text, even if a party does not request judicial notice be taken.

The outlier state appears to be Georgia, which requires a municipal ordinance to be placed in the record to support an arrest. *Traylor v. State*, 193 S.E.2d 876, 878 (Ga. App. 1972). The basis for that rule appears to be the quirk that, in Georgia, "[t]he defendant

had the right to leave, and to ignore or defy the arrest, if said arrest was illegal." *Id.* at 878. For decades, Iowa's common law and statutory law have held that suspects cannot resist unlawful arrests. *State v. Thomas*, 262 N.W.2d 607, 610–11 (Iowa 1978); Iowa Code § 804.12 (2015) (adopted in 1976, effective 1978). The Georgia rationale is thus inapposite.

This Court, if it resolves the question, should follow the prevailing rule and hold that the full text of an ordinance need not be pled and proven to support reasonable suspicion for a traffic stop.

C. No Iowa-Constitution issue is presented in this appeal and no mistake-of-law issue was preserved below. The Court of Appeals erred in deciding those issues.

Based on its resolution of the ordinance question discussed above, the Court of Appeals opinion pivoted to two questions that are not properly part of this appeal: a state-constitution challenge and a mistake-of-law argument. *See State v. Scheffert*, No. 16-0267, 2017 WL 1735627, at *2–3 (Iowa Ct. App. May 3, 2017). The defendant waived the former by failing to brief the issue and the defendant failed to preserve the latter because it was not argued to or ruled on by the district court.

First, as to the appellate-briefing waiver, a review of the defendant's brief is necessary. After making one boilerplate reference to the "Iowa and U.S. Constitutions," this is the constitutional argument he advances:

> "The Fourth Amendment of the United States Constitution prohibits 'unreasonable search and seizures.' *Tyler*, 830 N.W.2d at 291. "Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' within the meaning of [the Fourth Amendment]." *Whren v. United States*, 517 U.S. 806, 808 (1996). An automobile stop is constitutionally 4 permissible when the officer has either (1) probable cause due to observation of a traffic violation or (2) reasonable suspicion, supported by articulable facts that a criminal act has occurred or is occurring. *State v. Tague*, 676 N.W.2d 197, 201-04 (Iowa 2004)." *Burbridge* at 3 -4. Defendant's protection against unreasonable seizures was violated by this police stop of the automobile he was driving.

Defendant's Final Br. at 8–9. The remainder of his brief relies on exactly two legal authorities: Iowa Code section 350.5 (regulating county parks) and Iowa Code section 461A.36 (regulating the speed limit on state parks). *See* Defendant's Final Br. at 10–12. Not even the most generous interpretations of that brief could find that the

defendant advanced an argument premised on mistake of law under the Iowa Constitution.

A fundamental principle of appellate practice is that contentions relied upon by the parties must appear in the appellate briefing, supported by legal authority. *See Issues Argued*, 5 Am. Jur. 2d Appellate Review § 542 (Westlaw, updated August 2014); *Waiver of Issues Argued*, 5 Am. Jur. 2d Appellate Review § 514 (Westlaw, updated August 2014). This principle has been embedded in Iowa's case law for generations. *See, e.g., Livingston v. Davis*, 50 N.W.2d 592, 595 (Iowa 1951); *Tuttle v. Nichols Poultry & Egg Co.*, 35 N.W.2d 875, 880 (Iowa 1949); *Burns v. City of Waterloo*, 174 N.W. 644, 645 (Iowa 1919). And it appears in this Court's rules. *See* Iowa R. App. P. 6.903(2)(g); Iowa R. App. P. 6.904(4).

The legal basis for the Court of Appeals' Iowa Constitution ruling appears to be two cases: *State v. Coleman*, 890 N.W.2d 294, 298 (Iowa 2017) and *State v. Tyler*, 830 N.W.2d 288, 294 (Iowa 2013). *See Scheffert*, 2017 WL 1735627, at *3. *Coleman* was not cited by either party, as it was not yet published during briefing. And the defendant never cited *Tyler* for anything resembling a mistake-of-law claim: he cited it once in his standard of review, and once for the

unremarkable proposition that "The Fourth Amendment of the United States Constitution prohibits 'unreasonable search and seizures.'" Defendant's Final Br. at pp. 7–8. The Iowa Constitution mistake-of-law argument was not advanced by the defendant on appeal and it should not have appeared in the Court of Appeals opinion.

Second, the mistake-of-law issue is not properly part of this appeal, as it was not litigated below and error was not preserved. The defendant's motion to suppress asserted, without any specificity, that the stop and search were "conducted in violation of the Fourth Amendment to the Constitution of the United States and Article I, section 8 of the Iowa Constitution." 8/27/2015 Motion to Suppress; App. 6. The arguments at the hearing did not involve mistake of law in any shape or form. *See generally* supp. hrg. tr. The defendant's only argument was that there should have to be signs posted displaying the park's hours. *See* supp. hrg. tr. p. 21, line 12 — p. 25, line 8. This was the only issue addressed in the district court's written ruling. *See* 11/10/2015 Ruling; App. 7–8. Regardless of the quality of appellate briefing, Iowa appellate courts cannot reach

unpreserved claims. *E.g.*, *State v. Rutledge*, 600 N.W.2d 324, 325 (Iowa 1999).

As this Court has observed, an appellate court is not permitted to become "a roving commission that offers instinctual legal reactions to interesting issues that have not been raised or briefed by the parties and for which the record is often entirely inadequate if not completely barren. [They] decide only the concrete issues that were presented, litigated, and preserved in this case." *City of Davenport v. Seymour*, 755 N.W.2d 533, 545 (Iowa 2008); *accord Feld v. Borkowski*, 790 N.W.2d 72, 78 (Iowa 2010) ("Our obligation on appeal is to decide the case within the framework of the issues raised by the parties. … Consequently, we do no more and no less."); *Hyler v. Garner*, 548 N.W.2d 864, 876 (Iowa 1996) ("[W]e will not speculate on the arguments [the parties] might have made and then search for legal authority and comb the record for facts to support such arguments."). While the Court of Appeals may have correctly stated the relevant legal principles, appellate courts are not at liberty to serve as both partisan and referee, raising issues and then deciding them adversely to the State. *See, e.g.*, *Inghram v. Dairyland Mut. Ins. Co.*, 215 N.W.2d 239, 240 (Iowa 1974) ("To reach the merits of

this case would require us to assume a partisan role and undertake the appellant's research and advocacy. This role is one we refuse to assume.").

The bottom line is that there is no route by which the Court of Appeals could grant relief to the defendant based on the issue he raised. The ordinance issue discussed in Division I.A of the application was not preserved. The state-constitution claim was not briefed. And the mistake-of-law issue was neither briefed nor preserved. In the event this Court decides the ordinance issue adversely to the State, it should decline to reach the unbriefed and unpreserved Iowa Constitution mistake-of-law challenge and instead affirm. *See Heien v. North Carolina*, 135 S. Ct. 530, 537 (2014) (holding a reasonable mistake of law is permissible under federal law).

CONCLUSION

The Court should grant further review, vacate the Court of Appeals' decision, and affirm the district court's suppression ruling. In the event this Court declares a new rule requiring the State to offer the text of an ordinance to establish reasonable suspicion, the rule's application should be prospective only.

REQUEST FOR ORAL ARGUMENT

The State requests to be heard in oral argument.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This application complies with the type-volume limitation of Iowa R. App. P. 6.1103(4) because:

> this application has been prepared in a proportionally spaced typeface using Georgia in size 14 font, and contains **5,156** words, excluding the parts of the application exempted by Iowa R. 6.1103(4)(a).

Dated: May 18, 2017

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